



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL APPEAL 257 OF 2010**

**SAN ELECTRICALS LTD..... APPELLANT**

**VERSUS**

**SITIMA ENTERPRISES LIMITED..... 1<sup>ST</sup> RESPONDENT**

**JAYANTILAL SANDIR**

**JOYTIBEN JAYANTILE**

**ANDIP JAYANTILAL CHOTAI**

**ASHIK JAYNTILAL CHOTAI**

**NISHIT JAYANTILAL CHOTAI**

**T/A SAN ELECTRONICS..... 2<sup>ND</sup> RESPONDENT**

**RULING**

I have perused the Record of Appeal herein. What I gather is that a Memorandum of Appeal dated 28<sup>th</sup> June, 2010 was filed in the court on 2<sup>nd</sup> July, 2010 in an appeal which arises from a Ruling of the Chief Magistrate in Milimani Commercial Court CMCC No. 5779 of 2008 dated 26<sup>th</sup> April 2010 but delivered on 29<sup>th</sup> April 2010. The Ruling dismissed Appellant's application dated 17<sup>th</sup> December, 2009 on the grounds that the application was Res Judicata an earlier application dated 9<sup>th</sup> November, 2009. The dismissal aggrieved the Appellant who filed this appeal on 2<sup>nd</sup> July, 2010 as per the Order of the lower court dated 3<sup>rd</sup> June 2010 granting the Appellant leave to file an appeal within a period of 30 days.

The Respondents thereafter filed a Notice of Preliminary Objection dated 16<sup>th</sup> February, 2012 raising three grounds: -

***a) That the appeal did not lie of right on the matter ruled upon and that no leave to appeal was sought nor obtained.***

***b) That the appeal was filed out of time.***

***c) That the Appeal offends Section 68 of the Civil Procedure Act, Cap 21 of the Laws of Kenya.***

On 15<sup>th</sup> February, 2012 Mr. Mutubwa for the 1<sup>st</sup> Respondent successfully sought leave of court to serve the said Notice of the Preliminary Objection above mentioned. He also sought a hearing date for the same. The court in response fixed the hearing thereof on 24<sup>th</sup> April, 2012 with an order that the Respondent would serve a hearing notice and file a return of service within 7 days. However, because the court detected dragging of feet by the parties, it went ahead and fixed the main appeal for directions on 4<sup>th</sup> May, 2012.

On 24<sup>th</sup> April 2012 Mr. Mutubwa for the 1<sup>st</sup> Respondent attended court to prosecute the Preliminary Objection as ordered by the court on 15<sup>th</sup> February, 2012. He excused the Appellant's advocate Mr. Odhiambo for the latter's absence and proceeded to seek a fresh hearing date.

The court decided that the Preliminary Objection should be argued through written submissions. It prescribed the time for filing and serving such written submissions with highlighting to be done on 3<sup>rd</sup> July, 2012.

Although the Respondent who had authored the Preliminary Objection failed to file its written submission within the prescribed time, the Appellant went ahead and filed one, and the court allowed the objector to file one out of time on 3<sup>rd</sup> July, 2012. The parties were then allowed to highlight the main issues in the Preliminary Objection.

The relevant facts in the record show that the ruling that aggrieved the Appellant is the one by the Chief Magistrate Mr. Riechi dated 26<sup>th</sup> April 2010 but delivered on 28<sup>th</sup> April, 2010. As earlier indicated it dismissed Appellant's application dated 17<sup>th</sup> December, 2009 on the ground that the application was res judicata an earlier one dated 9<sup>th</sup> November, 2009.

Following the dismissal of his application above, the Appellant filed another application dated 6<sup>th</sup> May, 2010 seeking a stay of execution. On 3<sup>rd</sup> June, the lower court gave the Appellant the stay sought.

It made the following order: -

***“In the premises I order that there be a stay of execution pending this filing and determination of the intended appeal on the condition that the applicant deposit the whole of the decretal amount in court and file appeal within 30 days failing which the order of stay of execution will cease to have effect.”***

Thereafter, the Appellant filed this appeal on the 2<sup>nd</sup> July, 2010. This was the 29<sup>th</sup> day after the quoted order was made and therefore, within the period of 30 days prescribed by the Chief Magistrate, although clearly outside the period of 30 days prescribed under Section 79G of the Civil Procedure Act and Order 43(2) of the Civil Procedure Rules.

Issues raised by the 1<sup>st</sup> Respondent in this Point of Objection are mainly two: -

- 1. Whether the Appellant required leave to appeal and whether he sought and obtained such leave.***
- 2. Whether the appeal was filed within 30 days prescribed by law.***

The Appellant argued that he got leave to file an appeal and that he appealed within the 30 days authorized and granted by the Chief Magistrate on 3<sup>rd</sup> June, 2010. The Respondent on the other hand, argued that the order dismissing the Appellant's application as Res Judicata required leave to appeal against it and that the Appellant neither sought it nor ever obtained it, thus making the appeal eventually filed, an incompetent one.

I have carefully considered the issues. I have examined the application under which the Appellant had sought the stay of execution. The Appellant indeed had not under it, sought leave to appeal against the order dismissing his application on the principle of res judicata. However, when the Chief Magistrate granted a stay of execution of the Ruling dated 28<sup>th</sup> April 2010, he also went ahead to grant leave to the Appellant to file the appeal within 30 days upon the condition that the Appellant deposited the decretal amount in court within the same 30 days. Indeed the Appellant deposited the decretal sum and appealed on 2<sup>nd</sup> July, 2010 which was within the 30 days prescribed by the magistrate.

Having considered the issues before me, I do find that it was not necessary for the Appellant to file a separate formal application seeking leave of court to appeal or leave to appeal out of time. This is so because the Chief Magistrate's order, not only contained the leave required under Section 79G of the Act and Order 43 of the relevant Civil Procedure Rules but it also prescribed the period within which an appeal would be filed from the date of granting leave to appeal.

Put differently, had the Chief Magistrate only granted a stay of execution without more, it would have become necessary for the Appellant to formally seek leave to appeal and also seek leave to appeal out of time. The likelihood, indeed, necessity, to do so would have demanded that the applicant agitates such application before the same court that decided the application intended to be appealed from. In this case as shown however, the same court made such formal application for leave to appeal or appeal out of time unnecessary when the court expressly or impliedly granted the two leaves needed. It would have been a duplicated and unnecessary effort to seek the two leaves again.

In the above circumstances, the Objector/Respondent's argument that the applicant was under legal obligation to file formal applications for the leaves, holds little merit.

As to whether the appeal was filed out of time, it is my understanding that time would only begin running when the leave to appeal would start running. That date was the 3<sup>rd</sup> June, 2010, and 30 days hence would end on 2<sup>nd</sup> July, 010. The appeal herein was filed on 29<sup>th</sup> or 30<sup>th</sup> day and therefore within the time prescribed by the Chief Magistrate.

The conclusion I arrive at therefore, is that the Preliminary Objections raised herein, as shown above, are not meritorious. They are dismissed with a day's costs thereon to the Appellant in any event, the same to be taxed or agreed upon. Orders accordingly.

Dated and delivered at Nairobi on 10<sup>th</sup> day of July, 2012.

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**D A ONYANCHA**  
**JUDGE**